

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF)
 DELMARVA POWER & LIGHT COMPANY, INC.)
 EXELON CORPORATION, PEPCO HOLDINGS,)
 INC., PURPLE ACQUISITION CORPORATION,)
 EXELON ENERGY DELIVERY COMPANY, LLC,) PSC DOCKET NO. 14-193
 AND NEW SPECIAL PURPOSE ENTITY FOR)
 APPROVALS UNDER THE PROVISIONS OF)
 26 DEL. C. §§ 215 AND 1016)
 (FILED JUNE 18, 2014))

ORDER NO. 8863

AND NOW, this 22nd day of March, 2016, the Delaware Public Service Commission ("Commission") determines and orders the following:

1. On June 18, 2014, Delmarva Power & Light Company ("Delmarva"), Exelon Corporation ("Exelon"), Pepco Holdings Inc. ("PHI"), Purple Acquisition Company, Exelon Energy Delivery Company, LLC, and Special Purpose Entity, LLC ("Merger-Sub") (collectively the "Joint Applicants") filed an application seeking approvals under 26 Del. C. §§215 and 1016 for a change of control of Delmarva to be effected by a merger of PHI with Merger-Sub, a wholly-owned subsidiary of Exelon.

2. The Commission opened this docket to consider the application. The Division of the Public Advocate ("DPA") exercised its statutory right of intervention. Intervenor status was also granted to the Delaware Department of Natural Resources and Environmental Control ("DNREC"), the Mid-Atlantic Renewable Energy Coalition ("MAREC"), the Delaware Sustainable Energy Utility ("SEU"), NRG Energy, Inc., Partners for a Sustainable

Delaware, Chesapeake Utilities Corporation, Monitoring Analytics, LLC, the Clean Air Council ("CAC"), and Jeremy Firestone ("Dr. Firestone").

3. In February 2015, the Joint Applicants, the Commission Staff ("Staff"), the DPA, DNREC, MAREC, SEU and CAC presented the Commission with a Motion to Amend the Scheduling Order, to which was attached a Settlement Agreement executed by those parties (the "Initial Settlement Agreement"). Dr. Firestone was not a signatory to the Initial Settlement Agreement, and he opposed the Initial Settlement Agreement and the Merger.

4. In April 2015, the Joint Applicants, Staff, the DPA, DNREC, MAREC, SEU and CAC presented the Commission with an Amended Settlement Agreement ("Amended Settlement Agreement"). Dr. Firestone was not a signatory to the Amended Settlement Agreement; however, he advised the Commission that he did not oppose it. Indeed, he told the Commission that he was *not* signing the Amended Settlement Agreement because it did not address some of his "core issues." Transcript of April 7, 2015 Evidentiary Hearing at 534.

5. The Commission approved the Amended Settlement Agreement in a minute Order dated June 2, 2015. See PSC Order No. 8746.

6. On December 11, 2015, Dr. Firestone filed a motion for a "Cease and Desist Order Restraining the Delaware Division of Public Advocate from Taking Actions Antagonistic to the Amended

Settlement Agreement" (the "Motion to Cease and Desist"). The Motion alleged that the actions of the DPA before another state agency violated the Amended Settlement Agreement entered into between Staff, the DPA, DNREC, SEU, CAC, MAREC, and the Joint Applicants.

7. The Motion also alleged that on or about October 2, 2015, the DPA, without notice to the parties in this docket or to DNREC, attempted to collaterally attack DNREC's ongoing rulemaking in violation of the specific terms of the Amended Settlement Agreement.¹ Specifically, Dr. Firestone contended that certain comments filed on November 13, 2015 by the DPA in a DNREC rulemaking procedure suggested that DNREC does not have the authority to promulgate certain rules under Section 354 and Section 362(b) of Title 26 of the Delaware Code and that these comments violated certain provisions of the Amended Settlement Agreement.² The Motion sought to restrain the DPA from opposing renewable energy cost cap regulations being promulgated by DNREC and pursuing an appeal of the Commission's decision in PSC Docket No. 15-1462 (specifically, PSC Order No. 8807) regarding DNREC's authority to promulgate those same rules.

8. On January 7, 2016, in Order No. 8844, the Hearing Examiner stayed consideration of and decision on Dr. Firestone's Cease and Desist Motion, noting: (1) the existence of the DPA's pending appeal in Delaware Superior Court regarding PSC Order No

¹ See PSC Order No. 8807 (Dec. 3, 2015).

² See Motion to Cease and Desist at 3.

8807; and (2) the ultimate outcome of the Exelon-PHI merger was pending before the District Of Columbia Public Service Commission, which could affect the terms and conditions of the Amended Settlement Agreement.

9. On January 11, 2016, Dr. Firestone filed a "Motion to Quash, Vacate and Set Aside Unlawful Hearing Examiner Stay Order" on jurisdictional, due process, and substantive grounds (the "Motion to Quash"). The next day, on January 12, 2016, Dr. Firestone filed a "Petition for Interlocutory Review of Hearing Examiner's Unlawful Actions" and asked the Commission to vacate the Hearing Examiner's Order and decide his Cease and Desist Motion on the merits (the "Petition for Interlocutory Appeal").

10. The Commission included Dr. Firestone's Petition for Interlocutory Appeal on its February 4, 2016 agenda. Dr. Firestone informed the Commission Secretary that he was unavailable on that date and requested that the matter be adjourned until the February 23rd Commission meeting. The Commission granted Dr. Firestone's request and postponed consideration of his various motions until the next Commission meeting. In addition, the Commission set deadlines for the parties to file additional submissions in the docket in response to Dr. Firestone's various motions.³

³ Responses to Dr. Firestone's Petition for Interlocutory Appeal were due February 9, 2016; responses to the Motion to Quash and the Motion to Cease and Desist were due by February 11, 2016; and Dr. Firestone's response to the February 11th filings was due February 16, 2016.

11. On February 11, 2016, the Joint Applicants, Staff, and the DPA filed responses to the Motion to Cease and Desist, and the Joint Applicants and Staff filed responses to the Motion to Quash.⁴ On February 16, 2016, Dr. Firestone filed his reply to the responses of Staff, the DPA, and the Joint Applicants. The numerous filings raised several issues regarding the appropriateness of the relief that Dr. Firestone sought from this Commission.⁵ We have considered the Motion to Cease and Desist, the Motion to Quash, the Petition for Interlocutory Appeal, the responses filed by some of the parties, and Dr. Firestone's reply, and we heard oral argument from the parties at our February 23, 2016 meeting;

**NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE
VOTE OF NOT FEWER THAN THREE COMMISSIONERS:**

12. We have jurisdiction over this matter pursuant to 26 Del. C. §201 and 29 Del. C. §10128.

13. An interlocutory appeal from a ruling of a hearing examiner may be taken to the full Commission "where extraordinary circumstances necessitate a prompt decision by the Commission to prevent substantial injustice or detriment to the public interest." 26Del. Admin. C. §1001-2.16.1. Since no party objected to Dr. Firestone's Petition for Interlocutory Appeal, we

⁴ No parties filed any written response to Dr. Firestone's Interlocutory Petition.

⁵ The issues before the Commission included, inter alia: Dr. Firestone's standing to bring his various motions since he was not a signatory to the Amended Settlement Agreement; whether the issues were "ripe" (timely) for Commission's review; whether the Hearing Examiner was authorized by the Commission's initial order (PSC Order No. 8581 dated July 8, 2016) to consider and issue Order No. 8844 (Jan. 7, 2016) which stayed Dr. Firestone's Cease and Desist Motion; and whether the Commission had the power to enjoin another state agency.

will consider it unopposed. We find that the requirements of 26 Del. Admin. C. §1001-2.16.1 have been satisfied, and grant Dr. Firestone's Petition for Interlocutory Appeal.

14. By granting Dr. Firestone's Petition for Interlocutory Appeal, the Motion to Quash is properly before us as well as a procedural matter for our consideration. We will consider the Motion to Quash conflated into Dr. Firestone's request that this Commission consider his Motion to Cease and Desist on its merits.⁶

15. Having considered all the material presented to us by the various parties, we find that the provisions of 26 Del. C. §217 do not clearly give this Commission the right to enjoin any party other than a public utility. Our jurisdiction over all Delaware public utilities emanates from Section 201 of Title 26. Our ability to supervise, regulate, fine and enjoin is tied to public utilities only, over which we have exclusive jurisdiction. Our reading of the governing statutes does not support an expansion of our injunctive power over non-utility entities. If we are incorrect in this interpretation, the Legislature or the Delaware courts will so instruct us. Until then, we will construe our enabling statutes as limiting our injunctive power to public utilities only. See 26 Del. C. §§201 and 217.

⁶ After the filing of Dr. Firestone's Petition for Interlocutory Appeal, Senior Hearing Examiner Lawrence deferred all of Dr. Firestone's pleadings and the appeal to this Commission. See Item 12 in PSC Docket No. 14-193, DelaFile, Hearing Examiner's General Correspondence, dated January 14, 2016.

16. Furthermore, the DPA plays an important role in the State as an advocate for its constituency. See 29 Del. C. §8716 *et seq.* Dr. Firestone's Motion to Cease and Desist seeks to have this Commission enjoin the DPA from engaging in certain actions before another state agency--DNREC. Unless the Legislature sends this Commission a clear signal that we possess such power, we do not wish to restrain the actions of the DPA in dealing with DNREC for public policy and comity reasons. This is especially true where the applicable Delaware statutes arguably direct the Commission and DNREC to work together regarding renewable energy resource issues.

17. Our determination that this Commission does not possess the power to grant the relief requested in the Dr. Firestone' Motion to Cease and Desist vitiates the need to consider the Hearing Examiner's authority to issue Order No. 8844. Accordingly, Dr. Firestone's Motion for a Cease and Desist Order is denied, and his Motion to Quash is consequently granted. (Unanimous).

18. The Commission reserves the jurisdiction and authority to enter such further orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

Chair

Commissioner

Commissioner

Commissioner

Commissioner

ATTEST:

Secretary